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No. 00-568

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE TRANSMISSION ACCESS POLICY STUDY GROUP AS RESPONDENT IN NO. 00-568

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QUESTION PRESENTED IN NO. 00-568

By Order filed February 26, 2001, this Court granted certiorari with respect to the following question:

> Whether, given that Congress in 1935 stated that federal regulation extends "only to those matters which are not subject to regulation by the States" (Federal Power Act (FPA) § 201(a), 16 U.S.C. § 824(a)), and the transmission of energy from generators to retail customers in the same state was then "subject to regulation by the states" (as it has been since 1935), may the Federal Energy Regulatory Commission (FERC) preempt state jurisdiction over such intrastate retail transmission of electric energy?

RULE 29.6 STATEMENT

The Transmission Access Policy Study Group ("TAPS") is an informal association of transmission dependent utilities in more than twenty-five states, promoting open and non-discriminatory transmission access. While most TAPS members are municipal utilities, or associations or agencies thereof, one, Madison Gas & Electric Company ("MGE"), is a publicly held investor-owned utility. MGE has no parent company and no publicly held company owns 10% or more of MGE's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES v
STATEMENT 1
- A. Interest of TAPS 3
- B. Evolution of the Electric Industry 4
- C. Retail Competition 7
- D. Orders Below 11

SUMMARY OF ARGUMENT 14
ARGUMENT 16
I. THE STATES' ANALYSIS DOES NOT COMPORT WITH THE PLAIN LANGUAGE OF THE STATUTE 16
- A. Section 201(b)(1) Grants FERC Jurisdiction Over All Transmission of Electric Energy In Interstate Commerce, Not "Wholesale Sales and Associated Transmission In Interstate Commerce" 17
- B. The General Policy Declaration of Section 201(a) Cannot Undermine The Specific Grant of Jurisdiction To FERC Under Section 201(b)(1) 20
- C. The Plain Language Distinguishes Between Interstate Transmission and Local Distribution 21
- D. The Language of Section 206(d) Does Not Support the States' Position 24
- E. Sections 211 and 212 Do Not Support The States' Position 26

II. FERC CORRECTLY FOUND THAT ALL TRANSMISSION ON THE INTERCONNECTED GRID IS IN INTERSTATE COMMERCE 27
III. ONLY FERC IS COMPETENT TO REGULATE INTERSTATE TRANSMISSION 31
IV. FERC'S ASSERTION OF JURISDICTION DID NOT INVADE EXCLUSIVE STATE DOMAIN 38
- A. FERC Has Regulated Unbundled Retail Transmission For Decades 38
- B. FERC Cannot Be Faulted For Responding Promptly To The New Market Development Of Retail Electric Competition 41
- C. The States' Policy Arguments Cannot Eliminate the Need for Federal Regulation of the Interstate Transmission Required for Retail Choice Programs 43

CONCLUSION 45

TABLE OF AUTHORITIES

CASES

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 23
Arkansas Power & Light Co. v. FPC, 368 F.2d 376 (8th Cir. 1966) 28, 29
Bates v. United States, 522 U.S. 23 (1997) 18, 22
Buck v. Kuykendall, 267 U.S. 307 (1925) 36
In re California Power Exchange Corp., 245 F.3d 1110 (9th Cir. 2001) 2, 10
Connecticut Light & Power Co v. FPC, 324 U.S. 515 (1945) 20, 22
FPC v. Florida Power & Light Co., 404 U.S. 453 (1972) 28
FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972) 23, 31, 36, 37
FPC v. Southern California Edison Co., 376 U.S. 205 (1964) 20, 42
Gibbons v. Ogden, 22 U.S. 1 (1824) 37
Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) 5, 38
Healy v. The Beer Institute, 491 U.S. 324 (1989) 32
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 25
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 28, 37
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 5
Public Utilities Commission of California v. FERC, 143 F.3d 610 (D.C. Cir. 1998) 24
Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) 13
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 17

STATUTES

A.B. 6 § 3, 2001 Leg., 1st Ex. Sess. (Cal. 2001) 36
A.B. 1890, 1996 Leg., Reg. Sess. (Cal. 1996) 41
A.B. 1890 § 1(c), 1996 Leg., Reg. Sess. (Cal. 1996) 10
Energy Policy Act of 1992, Pub. L. No. 95-617, 92 Stat. 3117 (1978) 6
Federal Power Act,
16 U.S.C. § 824(a) 16, 19, 20, 24
16 U.S.C. § 824(b) 14, 20, 21
16 U.S.C. § 824(b)(1) ..... *passim*
16 U.S.C. § 824(c) 19, 20
16 U.S.C. § 824d 5
16 U.S.C. § 824e 5
16 U.S.C. § 824e(a) 25
16 U.S.C. § 824e(d) 24, 25
16 U.S.C. § 824j 6
16 U.S.C. § 824k 6
16 U.S.C. § 824k(a) 26
16 U.S.C. § 824k(e) 26
16 U.S.C. § 824k(h) 12, 26, 27
Illinois Electric Service Customer Choice and Rate Relief Law of 1997, 220 Ill. Comp. Stat. 5/16-101A(b), (d) (1997) 8
220 Ill. Comp. Stat. 5/16-126(a) (1997) 10
Massachusetts Electric Restructuring Act of 1997, Mass. Gen. Laws ch. 164, § 1(c) (1997) 8, 10
Montana Electric Utility Industry Restructuring and Customer Choice Act of 1997, Mont. Code Ann. §§ 69-8-102(1), (2) (1997) 8
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15 U.S.C. § 717(b) 23
15 U.S.C. § 717(c) 24
Oklahoma Electric Restructuring Act of 1997, Okla. Stat. tit. 17, § 190.2 (1997) 8
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Va. Code Ann. § 56.577 (1999) 10
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Heartland Energy Service, Inc., 68 F.E.R.C. ¶ 61,223 (1994) 7
Illinois Power Co., 95 F.E.R.C. ¶ 61,183, 2001 FERC LEXIS 1018 (May 8, 2001) 44
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Niagara Mohawk Power Corp., 34 F.E.R.C. ¶ 61,028 (1986) 39
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BRIEF OF THE TRANSMISSION ACCESS POLICY STUDY GROUP AS RESPONDENT IN NO. 00-568

STATEMENT OF THE CASE

Petitioners State of New York, *et al.* ("New York") challenge the Federal Energy Regulatory Commission's ("FERC" or "Commission")[1] assertion of jurisdiction over the rates, terms, and conditions of interstate transmission service by public utilities where states have elected to depart radically from traditional regulation of retail electricity sales. The issue raised by New York is limited to states that have adopted "retail competition," a regimen where a retail consumer may purchase electricity from the electricity supplier it chooses and have that energy "wheeled" over the interstate transmission facilities of its former monopoly supplier and others. New York objects to FERC's determination that such unbundled transmission service is within its jurisdiction under the Federal Power Act ("FPA"),

[1] As used herein, "FERC" or "Commission" also includes FERC's predecessor, the Federal Power Commission, where applicable.

and is subject to the uniform tariffs that apply to wholesale use of the same interstate transmission facilities.

New York attempts to cast a state's implementation of retail competition as business as usual, calling it merely "a change in bill format." (NY Br. at 8.) It claims that unbundling "does not necessarily alter the total due on a customer's bill" and is just "an accounting mechanism that allows customers the option of obtaining one or more retail service elements from competitive providers." (*Id.* at 9.)

Unbundling, or breaking out, the transmission supporting retail electricity sales is an element essential to state retail choice or retail competition programs. The terms "deregulation" and "restructuring" are commonly used to describe such state initiatives, which effect a profound change in the way electricity is purchased, sold, and regulated.[2] While the specifics of the retail choice regimes adopted by the various states differ, their fundamental premise is the same: replacement of state cost-of-service regulation of the generation function of a vertically integrated monopolist with direct retail customer access, via the interstate transmission facilities of their former supplier and others, to competitive generation markets.

Relying on the Federal Power Act's broad grant of jurisdiction over "the transmission of electric energy in interstate commerce" in Section 201(b)(1), 16 U.S.C. § 824(b)(1), FERC asserted jurisdiction over unbundled transmission for retail customers in the orders on review and extended its remedy for undue discrimination to this use of interstate transmission.[3] FERC placed unbundled

[2] *See, e.g., In re California Power Exchange Corp.*, 245 F.3d 1110, 1114 (9th Cir. 2001) (describing the "major restructuring" embarked on by the California legislature).

[3] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, [1991-1996 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (May 10, 1996), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274 (Mar. 14, 1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (Dec. 9, 1997), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *petitions for cert. granted sub nom. New York v. FERC*, No. 00-568 and *Enron Power Marketing, Inc. v. FERC*, No. 00-809 (U.S. Feb. 26, 2001), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998).

transmission for retail choice customers under the open access transmission tariffs it required for wholesale users, providing such retail customers access to the interstate transmission grid (which they must share with other users) on the non-discriminatory terms FERC found essential for competitive electricity markets to develop and thrive.[4] In this way, FERC established the regulatory underpinning necessary to support a state's decision to permit retail customers direct access to competitive interstate markets.

A. Interest of TAPS

The Transmission Access Policy Study Group ("TAPS") is an informal association of transmission dependent utilities in more than twenty-five states, promoting open and non-discriminatory transmission access. To serve their customers reliably and at reasonable cost, TAPS members rely (in whole or in part) on wholesale power purchases and energy from their own remote resources. As a result, TAPS members must depend on the transmission facilities owned and controlled by others. This dependence has placed TAPS

[4] The transmission service that public utilities provide themselves for purposes of making bundled retail sales is also transmission in interstate commerce. Particularly in the context of competitive electricity markets, differences between the bundled transmission service that utilities provide themselves and the transmission provided to their competitors raise issues of undue discrimination that are before the Court in No. 00-809. TAPS supports Petitioner Enron's position in No. 00-809, but limits itself to responding to New York's (and *amicus* California's) challenge to FERC's jurisdiction in this docket.

members on the front line of battles for equal transmission access. They have experienced first-hand the competitive disadvantage and market disruption that results from discriminatory limits on access to interstate transmission.[5]

B. Evolution of the Electric Industry

Traditionally, the electric industry was largely comprised of vertically integrated, investor-owned electric utilities that operated as regulated monopolies. They would own the generation, transmission, and distribution facilities required to serve, on a bundled (combined delivered product) basis, retail customers within their franchised service areas and embedded wholesale customers (municipal, cooperative or smaller investor-owned utilities located on their transmission system).[6] Each utility's transmission system was largely used to integrate its own generation to serve its retail and wholesale customers. With weak interconnections and the inefficiencies then inherent in long distance transmission, there was limited coordination among utilities, and little unbundled transmission service.[7]

Starting in the late 1960s, with rising power costs and increasing efficiency of long distance transmission, wholesale customers sought access to sources other than their surrounding bundled supplier.[8] Because wholesale customers were typically transmission dependent islands in the sea of their existing supplier, a purchase from another utility (or participation in an efficient generating unit) required transmission service from their existing supplier.

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[5] Many of the examples of discriminatory transmission cited in Order 888 pertain to TAPS members. *See* Order 888, 61 Fed. Reg. at 21,567-69, 21,702-06, Enron App. D at 213a-21[illegible]a, 315a-331a. Citations in this brief to "Enron App." are to the Appendix filed with Enron's Petition for Writ of Certiorari in No. 00-809.

[6] *See* Order 888, 61 Fed. Reg. at 21,543, Enron App. D at 141a.

[7] *See id.*

[8] *See* Order 888, 61 Fed. Reg. at 21,544-45, Enron App. D at 146a-147a.

Transmission dependent utilities often were able to negotiate some form of "voluntary" transmission service, albeit sometimes with the help of antitrust license conditions imposed by the Nuclear Regulatory Commission[9] or the threat of antitrust litigation.[10] However, this transmission service was typically inferior to the service that the vertically-integrated transmission owner provided itself.[11] Although the Federal Power Act expressly required the Commission to ensure that the rates, terms, and conditions of transmission service were just and reasonable and not unduly discriminatory or preferential,[12] and notwithstanding this Court's instruction that the FPA "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of the interstate utility operations pursuant to §§ 202 and 203, and under like directives in §§ 205, 206, and 207,"[13] the Commission was reluctant to test its authority to require more transmission service than a utility voluntarily offered.[14] Instead, FERC generally limited itself to determining transmission rates for unbundled transmission contracts or the transmission component of bundled wholesale sales. When discrimination issues were raised, FERC measured undue discrimination

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[9] *See, e.g., Consumers Power Co.* (Midland Plant, Units 1 & 2), 6 N.R.C. 892, 1043 (1977).

[10] *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). *See generally* Order 888, 61 Fed. Reg. at 21,546 & n.51, Enron App. D at 152a-153a.

[11] *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Notice of Proposed Rule Making and Supplemental Notice of Proposed Rulemaking, [1988-1998 Proposed Regs.] F.E.R.C. Stats. & Regs. ¶ 32,514, 60 Fed. Reg. 17,662, 17,676 (Apr. 7, 1995) ("NOPR"), Enron App. F at 610a-620a; Order 888, 61 Fed. Reg. at 21,567-69, 21,703-06, Enron App. D at 213a-218a, 315a-331a.

[12] Sections 205 and 206, 16 U.S.C. §§ 824d and 824e.

[13] *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973).

[14] *See* Order 888, 61 Fed. Reg. at 21,561-62, Enron App. D at 184a-189a.

only as between similarly situated wholesale customers, ignoring the superior terms implicit in the service the vertically integrated transmission owner provided itself.[15]

Through the 1978 Public Utility Regulatory Policies Act ("PURPA")[16] and particularly with the enactment of the 1992 Energy Policy Act ("EPAct"),[17] new classes of competitive wholesale generators emerged, which depended on transmission provided by others to market their output.[18] FERC's PURPA-initiated authority to order wholesale transmission service pursuant to FPA Sections 211 and 212, 16 U.S.C. §§ 824j, 824k, was expanded and strengthened by EPAct. FERC found that EPAct evinced Congressional intent that the Commission promote competitive electricity markets, and a recognition of the role of transmission as the essential highways for this interstate commerce.[19]

On the premise that in the absence of market power the competitive market could be depended upon to discipline prices to the statutory just and reasonable level, FERC began authorizing "market-based rates" at wholesale where a particular seller had demonstrated that it (and its affiliates) did not possess or had mitigated market power in generation and transmission. Vertically integrated utilities could show

[15] *See, e.g., Wisconsin Elec. Power Co.*, 46 F.E.R.C. ¶ 61,019, at 61,113-16, *reh'g denied*, 48 F.E.R.C. ¶ 61,247, at 61,861-62 (1989), *petition for review denied per curiam sub nom. Wisconsin Public Power Inc. System v. FERC*, 918 F.2d 225 (D.C. Cir. 1990).

[16] Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified in U.S.C. titles 15, 16, 26, 40, 42, and 43).

[17] Pub. L. No. 102-486, 106 Stat. 2921 (1992) (codified at, among other places, 15 U.S.C. § 79a-51 and 16 U.S.C. §§ 796 (22-25), 824j-l).

[18] *See* Order 888, 61 Fed. Reg. at 21,545, Enron App. D at 147a-156a.

[19] *See* Order 888, 61 Fed. Reg. at 21,562-63, Enron App. D at 191a-193a. *See also Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,044, 61 Fed. Reg. 68,595, 68,596 (Dec. 30, 1996), *recons. denied*, Order No. 592-A, 79 F.E.R.C. ¶ 61,321 (1997).

mitigation of transmission market power by offering an "open access" tariff.[20] In this context, the Commission first began to consider the service the vertically integrated transmission owner provided itself as the benchmark for undue discrimination.[21]

In 1994, in light of changing industry conditions and increasing competition, the Commission reevaluated its standards for undue discrimination. The Commission broadened the focus of undue discrimination to include consideration of the transmission owner's own use of its transmission system. To be found not unduly discriminatory, an open access tariff would have to offer third parties access "under the same or comparable terms and conditions ... as the transmission provider's uses of its system."[22]

C. Retail Competition

Against the backdrop of growing wholesale competition an ever louder drumbeat for retail choice began to be heard, especially in higher cost states, to enable retail customers to enjoy the anticipated savings from competitive electricity markets.[23] Currently, some 25 states have through their legislatures or regulatory commissions taken some steps to

[20] *See, e.g., Heartland Energy Serv., Inc.*, 68 F.E.R.C. ¶ 61,223, at 62,060 (1994). *See also* Order 888, 61 Fed. Reg. at 21,553.

[21] *See, e.g., Public Serv. Co. of Indiana, Inc.*, 51 F.E.R.C. ¶ 61,367, at 62,201 (to prevent "unfair competitive advantage" in marketing bulk power, PSI must serve itself under the terms of the same transmission tariff to which other utilities are subject), *reh'g denied*, 52 F.E.R.C. ¶ 61,260, *order on clarification*, 53 F.E.R.C. ¶ 61,131 (1990), *petition for review dismissed sub nom. North Indiana Public Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992).

[22] *American Elec. Power Serv. Corp.*, 67 F.E.R.C. ¶ 61,168, at 61,490, *clarified*, 67 F.E.R.C. ¶ 61,317 (1994), discussed in Order 888, 61 Fed. Reg. at 21,547-48, Enron App. D at 159a-162a.

[23] *See* Order 888, 61 Fed. Reg. at 21,550 & n.101, Enron App. D at 431a & n.101-432a; Order 888-A, 62 Fed. Reg. at 12,280-81, Enron App. E at 402a-403a.

adopt retail competition.[24] In states implementing retail choice, the contractual and regulatory paradigm, and the resulting use of the transmission system, depart starkly from the traditional regulatory regimen described by New York. (NY at Br. 4-6.)

The specifics of state retail choice programs vary widely, but they share a common element: use of the interstate transmission grid "to allow direct access by retail consumers to the competitive market for the generation of electricity."[25] States adopting retail competition have decided that the public would be "best served by moving from (i) the regulatory framework ... in which retail electricity service is provided principally by public utility corporations obligated to provide ultimate consumers in exclusive service territories with reliable electric service at regulated rates, to (ii) a framework under which competitive producers will supply electric power and customers will gain the right to choose their electric power supplier."[26] Retail customers are invited

[24] (*See* NY Br. at 9 n.5.)

[25] Oklahoma Electric Restructuring Act of 1997, Okla. Stat. tit. 17, § 190.2 (1997), Section 2. *See also* Montana Electric Utility Industry Restructuring and Customer Choice Act of 1997, Mont. Code Ann. §§ 69-8-102(1), (2) (1997) ("(1) The generation and sale of electricity is becoming a competitive industry. (2) Montana customers should have the freedom to choose their supplier of electricity and related services in a competitive market...").

[26] Massachusetts Electric Restructuring Act of 1997, Mass. Gen. Laws ch. 164, § 1(c) (1997). *See also* Pennsylvania Electric Generation Customer Choice and Competition Act, 66 Pa. Cons. Stat. §§ 2802(13), (14) (2000) (provides for "transition from the current regulated structure to a structure under which retail customers will have direct access to a competitive market for the generation and sale or purchase of electricity" and "requires electric utilities to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers in this Commonwealth"); Illinois Electric Service Customer Choice and Rate Relief Law of 1997, 220 Ill. Comp. Stat. 5/16-101A(b), (d) (1997) ("Long-standing regulatory relationships need to be altered to

to deal directly with competitive generation suppliers,[27] and to have their energy purchase "wheeled" over the interstate grid, including the transmission facilities of their former monopoly supplier.[28] This direct access to competitive generation markets substitutes for regulation and is expected to provide consumers efficient, low cost, and reliable power.

The success of retail deregulation is inextricably tied to the effectiveness of interstate wholesale markets on which such regimens necessarily depend.[29] Some states established new market structures to facilitate competition. For example, in what California refers to as its "now notorious electric utility deregulation experiment" (CA Br. at 1), investor-owned utilities initially were required to sell the output of their generation to a state-established power exchange, and then buy on the wholesale spot market the energy required to meet

accommodate the competition that could fundamentally alter the structure of the electric services market").

[27] Such competitive suppliers include independent generators, regional or national marketers (like Enron), and other utilities. Some states license suppliers to ensure, *e.g.*, financial responsibility. *See, e.g.*, Virginia Electric Restructuring Act of 1999, Va. Code Ann. § 56-587(B) (1999); 66 Pa. Cons. Stat. § 2809 (2000).

[28] The former supplier may take on a new role as "default supplier" for customers that do not choose a competitive supplier (or where the competitive supplier fails to perform), although some state laws authorize assignment of the default supplier function by competitive bidding. *See, e.g.*, Va. Code Ann. § 56-585(B)(2) (2001).

[29] *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 F.E.R.C. ¶ 61,121, at 61,350 ("a well functioning competitive wholesale power market in California, which includes a well functioning regional transmission grid, is a fundamental part of the solution to the supply problems and price volatility in California"), *order directing remedies*, 93 F.E.R.C. ¶ 61,294 (2000), *reh'g pending. See also*, Jon Kamp, *Wholesale Power Mkt May Sour Dereg In Illinois - Report*, Wall St. J., May 9, 2001, *available at* http://interactive.wsj.com/archive/retrieve.cgi?id=DI-CO-20010509-003071.dim.

the needs of customers located on their distributions systems that did not select a new supplier.[30] Before energy reached such a retail customer, it would go through multiple wholesale transactions as it was sold into and out of these centralized markets.[31]

Some state deregulation programs were developed against the background of "independent system operators" formed by power pools (at FERC encouragement[32]) to operate multi-utility transmission facilities on an efficient and non-discriminatory basis under a regional tariff.[33] Other states recognized the importance of region-wide transmission to broadening generation markets, and increasing their competitiveness, by including in their restructuring law the requirement that vertically integrated utilities join independent regional transmission organizations.[34]

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[30] *See In re California Power Exchange Corp.*, 245 F.3d at 1114-15 (describing California's "must sell" and "must buy" provisions, their evolution, and associated institutions).

[31] *See Pacific Gas & Electric Co.*, 77 F.E.R.C. ¶ 61,204, at 61,794-95 (1996), *reh'g denied*, 81 F.E.R.C. ¶ 61,122 (1997).

[32] *See* Order 888, 61 Fed. Reg. at 21,593-94 & n.417; *see also id.* at 21,594-97.

[33] *See, e.g.*, 1997 Mass. Gen. Laws ch. 164 § 1(c) (authorizing Massachusetts regulators to "coordinate with the operator of the bulk power system in New England" and "monitor any independent systems operator serving the New England/New York area formed through federal statute or regulation"); N.J. Stat. Ann. § 48:3-78 (1999) (referencing PJM Interconnection, L.L.C. independent system operator).

[34] *See, e.g.*, 220 Ill. Comp. Stat. 5/16-126(a) (1997) ("establishment of one or more independent system operators or their functional equivalents is required to facilitate the development of an open and efficient marketplace for electric power and energy"; each utility is required to apply to FERC to establish or join such an organization); Va. Code Ann. § 56-577 (1999) (each incumbent utility is required to join or establish a regional transmission entity); A.B. 1890 § 1(c), 1996 Leg., Reg. Sess. (Cal. 1996) (enacted) (expressing legislative intent to create an independent system operator).

D. Orders Below

In Orders 888 and 888-A, the Commission exercised its responsibility under Sections 205 and 206 of the FPA to remedy the widespread undue discrimination it found in interstate transmission service.[35] FERC identified discrimination as the single greatest impediment to competitive power markets.[36]

The Commission found non-discriminatory open access to interstate transmission service necessary to remove impediments to, and to promote, competitive electricity markets, consistent with the pro-competitive purposes of the Federal Power Act and EPAct.[37] To eliminate the "patchwork" of systems using different access terms,[38] to ensure "that the integrity and reliability of our electricity infrastructure is maintained,"[39] and "to foster broad access across multiple systems under standardized terms and conditions,"[40] the Commission ordered all public utilities to file transmission tariffs conforming to the *pro forma* open access tariff included in its rule. FERC required public utilities to take transmission service for their own wholesale sales under that tariff and to rely on the same transmission

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[35] *See* Order 888, 61 Fed. Reg. at 21,567, Enron App. D at 213a-218a.

[36] *See* Order 888, 61 Fed. Reg. at 21,550, Enron App. D at 171a-172a. *See also* NOPR, 60 Fed. Reg. at 17,664, 17,675-76.

[37] *See* Order 888, 61 Fed. Reg. at 21,541, 21,550, 21,568-69, Enron App. D at 131a-134a, 171a-172a, 218a; Order 888-A, 62 Fed. Reg. at 12,275-76, Enron App. E at 380a-383a. FERC concluded that radical changes in the industry required it to find unduly discriminatory practices it had previously tolerated and to address directly the terms on which transmission owners used their own transmission system. Order 888, 61 Fed. Reg. at 21,568-69, Enron App. D at 217a-218a.

[38] Order 888, 61 Fed. Reg. at 21,541, Enron App. D at 133a.

[39] *Id.*

[40] Order 888, 61 Fed. Reg. at 21,598, Enron App. D at 259a.

information for wholesale marketing that they make available to others.[41]

The Commission's *pro forma* tariff contains the "specific terms and conditions" for non-discriminatory open access, rather than mere general principles as some utilities had urged.[42] The tariff is intended to be comprehensive.[43] It includes detailed specifications of the rights and obligations associated with the various types of transmission service required to be provided.[44] These include the procedures for requesting, reserving, assigning, modifying, and scheduling transmission service; evaluating transmission requests; deciding among competing requests for service; expanding facilities to satisfy transmission requests; and allocating curtailments in the event of insufficient capacity.[45]

In Order 888, the Commission also asserted jurisdiction over public utilities' provision of unbundled transmission in interstate commerce associated with state retail competition programs. Consistent with Section 212(h) of the FPA, 16 U.S.C. § 824k(h), the Commission left to individual states the determination as to whether to allow their retail customers to participate directly in competitive interstate markets through retail wheeling. However, FERC determined

[41] Order 888, 61 Fed. Reg. at 21,541, Enron App. D at 133a; Order 888-A, 62 Fed. Reg. at 12,299, Enron App. E at 451a.

[42] Order 888, 61 Fed. Reg. at 21,598, Enron App. D at 259a.

[43] Certain variations were permitted to conform to regional practice. Order 888, 61 Fed. Reg. at 21,598, Enron App. D at 259a- 260a. Public utilities were permitted subsequently to "propose variations that are consistent with or superior to the terms and conditions" of the *pro forma* tariff, Order 888, 61 Fed. Reg. at 21,598 n.434, Enron App D at 259a n.434; *accord id.*, 61 Fed. Reg. at 21,619, Enron App. D at 279a-280a, but not to "litigate fundamental terms and conditions set forth in the Final Rule." *Id.*

[44] The Commission found non-price terms and conditions inseparable from pricing and cost recovery. *See* Order 888, 61 Fed. Reg. at 21,598, Enron App. D at 258a.

[45] *See* Order 888, *pro forma* tariff, 61 Fed. Reg. at 21,706-24.

that where a state elects to implement retail competition, the unbundled transmission necessary to support a retail customer's purchase from a competitive electricity supplier is a separate FERC-jurisdictional service that must be provided pursuant to the open access tariffs applicable to wholesale customers.[46]

In asserting jurisdiction over unbundled retail transmission, the Commission recognized that all transmission service in the interconnected grid is in interstate commerce,[47] and made clear its concern with preventing "balkanized" power markets. Where "consistent with the Commission's open access policies and comparability," FERC committed to defer to state requests to adapt the tariff to retail access programs[48] and to state determinations drawing the line between FERC-jurisdictional transmission and state-jurisdictional local distribution facilities.[49] "We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies."[50]

The D.C. Circuit upheld Order 888 in most regards, including FERC's assertion of jurisdiction over unbundled retail transmission: "We are bound by the High Court's dictates to conclude that the FPA gives FERC the authority to regulate the transmissions at issue here, whether retail or wholesale." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000). Enron App. B at 34a. In addition, the D.C. Circuit determined that even absent

[46] *See* Order 888, 61 Fed. Reg. at 21,625-26, Enron App. D. at 304a-308a.

[47] Order 888, 61 Fed. Reg. at 21,725, Enron App. D at 336a. *See also* Part II below and Brief of Enron as Respondent in No. 00-568 at 18-22 for description of transmission on the two interstate grids.

[48] *See* Order 888, 61 Fed. Reg. at 21,627, Enron App. D at 314a; *see also id.*, 61 Fed. Reg. at 21,572, Enron App. D at 231a.

[49] *See* Order 888, 61 Fed. Reg. at 21,626, Enron App. D at 311a.

[50] *See* Order 888, 61 Fed. Reg. at 21,542, Enron App. D at 136a-137a. *See also id.* 61 Fed. Reg. at 21,628, Enron App. D at 314a-315a.

binding precedent, FERC's interpretation would be sustained. *Id.*, Enron App. B at 34a-35a.

SUMMARY OF ARGUMENT

New York and California[51] challenge FERC's determination, as part of its remedy for undue discrimination in interstate transmission service, to assert jurisdiction over the transmission service used to provide retail customers direct access to their choice of a competitive generation supplier. Their arguments cannot overcome the language of the FPA, the inability of individual states to regulate interstate transmission service, and the fact that only federal regulation can provide the non-discriminatory transmission required to support federal policy, as well as the policy of retail choice states, in favor of competitive electricity markets.

To claim state jurisdiction over the unbundled transmission supporting direct sales by competitive suppliers to retail customers, New York and California are forced to read into the FPA language that does not exist and to ignore FPA Section 201(b)'s broad grant of jurisdiction to FERC over the "transmission of electric energy in interstate commerce." The plain language of the FPA is contrary to the States' core premise that the FPA accords FERC jurisdiction only over the interstate transmission associated with wholesale sales. The FPA limits FERC's jurisdiction over sales of electric energy to wholesale sales, but contains no such limitation with respect to FERC's jurisdiction over interstate transmission.

New York's claim that retail electric customers are served by intrastate transmission is a fiction. FERC correctly held, following this Court's precedent, that as a matter of engineering reality, all transmission on the interconnected interstate grid is in interstate commerce. The fallacy of New

[51] New York and California are jointly referred to herein as "the States."

York's characterization is particularly apparent in the context of retail competition programs, whose essence is the empowerment of retail customers to use transmission to access competitive interstate generation markets and deal directly with the suppliers of their choice.

Congress' wisdom in granting FERC plenary authority over transmission in interstate commerce is confirmed by the practical reality that states are unable to regulate the interstate transmission required to support retail customers' direct access to competitive generation markets. State attempts to do so would necessarily leave important gaps. No single state could regulate the transmission required for a retail customer in state A to transact with a competitive generator in state B. Perhaps even more troubling, adoption of the States' position would invite discrimination and lead to conflicts over use of what is necessarily a unitary transmission network. No regulatory authority, state or federal, would have jurisdiction to resolve such conflicts. The result would inevitably thwart retail choice programs in neighboring states and undermine federal policy in favor of competitive interstate electricity markets.

Unlike the states, FERC can and has bridged the gap through its open access tariffs, which provide the means for retail choice customers to obtain the transmission service necessary to reach competitive suppliers, wherever located. The non-discriminatory open access transmission service FERC found essential for competitive electricity markets can only be achieved through a single set of rules, administered by federal authority.

New York's contention that FERC's action invades what had been the exclusive regulatory domain of the states is not only insufficient to overcome the FPA's express grant of authority, but is wrong as a matter of fact. For decades FERC has exercised jurisdiction over unbundled transmission for retail customers in those limited cases where such transmission was provided notwithstanding state-sanctioned

exclusive retail service territories. What is new is not FERC regulation of unbundled transmission for retail customers. Instead, it is the greatly expanded volume of such transmission resulting from state decisions to drastically alter the way electricity is purchased, sold, and regulated.

The States' effort to support their position on policy grounds demonstrates only their failure to grasp or attempt to obscure what is at stake. States adopting retail choice are depending on competitive markets to discipline generation prices to just and reasonable levels. Reliance on competition in lieu of regulation can only succeed in the context of robust interstate markets. FERC's assertion of jurisdiction over the interstate transmission used by retail choice customers is an essential regulatory predicate for ensuring the non-discriminatory access to the interstate transmission grid essential to the competitive interstate markets relied on by retail choice and wholesale customers.

ARGUMENT

I. THE STATES' ANALYSIS DOES NOT COMPORT WITH THE PLAIN LANGUAGE OF THE STATUTE

New York argues that the FPA affords the states jurisdiction over the unbundled transmission service used to facilitate retail sales. According to New York, "§ 201(a) preserves state jurisdiction over retail transmissions." (NY Br. at 40.) California contends that "FERC's jurisdiction does not extend to the part of transmission in interstate commerce that constitutes local distribution." (CA Br. at 3.) Both positions suffer from the same defect. New York and California read the FPA as creating a bright line jurisdictional divide between retail and wholesale sales and between retail and wholesale transmission.

This interpretation founders on the hard shoals of the plain language of the statute. The FPA does divide federal and state jurisdiction over sales along wholesale and retail lines.

No corresponding divide exists with respect to transmission. Fatal to their position, New York and California read the statute to say what it does not say, and ignore what it plainly does says. Nor can their reliance on isolated extracts of legislative history overcome the FPA's express language.[52] Where the statute's language is plain, as here, that is the end of the matter.[53]

New York also argues that the unbundled transmission service supporting retail electric sales is not transmission of electric energy in interstate commerce. (NY Br. at 45 n.28.) This contention is contrary to FERC's expert determination, applicable precedent of this Court and lower courts, and wrong. California apparently agrees with FERC, and concedes "the expansive nature of 'transmission in interstate commerce' when electric systems are interconnected." (CA Br. at 22.)

A. Section 201(b)(1) Grants FERC Jurisdiction Over All Transmission of Electric Energy In Interstate Commerce, Not "Wholesale Sales and Associated Transmission In Interstate Commerce"

Section 201(b)(1) of the Federal Power Act grants FERC jurisdiction over "the transmission of electric energy in interstate commerce."[54] In explaining its legal authority to place unbundled retail transmission under the rates, terms, and conditions of the *pro forma* tariff, FERC correctly found this statutory language "compelling." Order 888, 61 Fed. Reg. at 21,625, Enron App. D at 305a. "[S]ection 201 of the FPA, *on its face*, gives the Commission jurisdiction over transmission in interstate commerce (by public utilities)

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[52] *See* Brief of Enron as Respondent in No. 00-568 at 25-28.

[53] Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

[54] 16 U.S.C. § 824(b)(1).

without qualification." *Id.* (emphasis in original). Separate and independent of the grant of authority over transmission in interstate commerce, Section 201(b)(1) also provides FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce."

New York studiously avoids the relevant language of Section 201(b)(1). Only twice in its brief, in the recitation of the "Statutory Provisions Involved" (NY Br. at 2), and in passing (*id.* at 40), does New York even quote the statutory language that FERC stands on. Instead, New York repeatedly, and erroneously, contends that the "FPA[] authoriz[es] FERC to regulate wholesale sales *and associated transmission* in interstate commerce." (*Id.* at 7 (emphasis supplied). *See also id.* at 26 ("Associated Transmissions") and 30-31 ("transmissions associated with wholesale transactions").)

Section 201(b) leaves no portion of interstate transmission by public utilities to the states' jurisdiction. The delegation of authority to FERC is exclusive and comprehensive. Section 201(b) expressly distinguishes between FERC's regulatory authority over the transmission of electric energy in interstate commerce and the additional provision of FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce...." Unlike its jurisdiction over sales of electricity, FERC's jurisdiction over transmission is not limited to transmission of electrical energy associated with a wholesale sale. The necessary conclusion is that Congress intended no such limitation on the scope of FERC's jurisdiction over interstate transmission. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997).

Section 201(b)(1) states that Part II of the FPA shall apply to (and thus FERC shall have jurisdiction over) "*the* transmission of electric energy in interstate commerce."[55] The use of the definite article "the" clearly indicates that

[55] 16 U.S.C. § 824(b)(1) (emphasis supplied).

there is only one body of interstate electrical transmission and that all of it is FERC jurisdictional. Section 201(b)(1)'s complete grant of jurisdiction to FERC over "the" subject of interstate electric transmission cannot be reconciled with New York's and California's respective contentions that some portion of interstate transmission is reserved to the states under Section 201(a) or constitutes state-regulated "local distribution" under 201(b)(1).

The phrase "transmission ... in interstate commerce" appears throughout Section 201. Consistent with Section 201(b)(1), Section 201(a) expressly provides for "Federal regulation ... of the transmission of electric energy in interstate commerce," and differentiates this regulatory authority from FERC's jurisdiction over "the sale of such energy at wholesale in interstate commerce."[56]

Section 201(c) defines "interstate transmission" that FERC regulates under Section 201(b)(1) (and Part II of the FPA) as "electric energy ... transmitted from a State and consumed at any point outside thereof."[57] Tellingly, and consistent with Sections 201(a) and 201(b), Section 201(c) nowhere limits FERC's jurisdiction to transmission associated with wholesale sales. In drafting Section 201 and Part II of the Federal Power Act, Congress could have easily limited FERC's jurisdiction over interstate transmission to transmission associated with wholesale sales. It did not do so. Instead, Section 201(b) sweepingly and exhaustively grants FERC jurisdiction over the transmission of all electrical energy in interstate commerce by public utilities.

Although New York (NY Br. at 45) contends that the plain language of Section 201(c) supports its position, New York's

[56] 16 U.S.C. § 824(a).

[57] Section 201(c) provides in full: "For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof: but only insofar as such transmission takes place within the United States." 16 U.S.C. § 824(c).

reading is predicated upon a factual contention rejected by FERC and this Court, *i.e.*, that there are separate streams of interstate and intrastate electrons on the interconnected interstate grid supplying discrete individual loads. *See* Part II *infra*. FERC properly determined that all transmission of electricity on the interconnected grid, including unbundled retail transmission, is in interstate commerce within the meaning of Section 201(c).

B. The General Policy Declaration of Section 201(a) Cannot Undermine The Specific Grant of Jurisdiction To FERC Under Section 201(b)(1)

New York argues that Section 201(a) of the FPA preserves state jurisdiction over "retail transmission ... that [was] being regulated by the states in 1935." (NY Br. at 33.) California argues that "any reasonable doubt" as to FERC's exercise of jurisdiction over unbundled retail transmission must be exercised against FERC pursuant to "Section 201(a)'s rule of construction." (CA Br. at 26.) The States are wrong.

As a matter of statutory interpretation, the States' Section 201(a) arguments falter against the express grant of jurisdiction in Section 201(b). Under basic canons of statutory construction, and as this Court has held, the exhortatory provisions of Section 201(a) cannot subvert Section 201(b)'s specific grant of authority. Section "201(a) was merely a 'policy declaration ... of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'" *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215 (1964) ("*Colton*") (quoting *Connecticut Light & Power Co. v FPC*, 324 U.S. 515, 527 (1945)). California concedes that Section 201(a) is a "policy provision" and cannot "nullify a clear and specific grant of jurisdiction." (CA Br. at 25 (quoting *CL&P*, 324 U.S. at 527).) Because Section 201(b)(1) expressly grants FERC jurisdiction over the transmission of electricity in interstate

commerce, *Colton* disposes of the States' Section 201(a) arguments.

C. The Plain Language Distinguishes Between Interstate Transmission and Local Distribution

Unlike New York, California addresses the critical language of Section 201(b) and acknowledges that the phrase "transmission ... in interstate commerce" as used in Section 201(b) encompasses transmission used to support wholesale and retail sales. Thus, California concedes the fundamental premise of FERC's exercise of jurisdiction over unbundled retail transmission. However, California equates "transmission ... service to retail customers" with the phrase "local distribution." (CA Br. at 16.) California contends that "local distribution is ... *a subset* ... of transmission in interstate commerce." (*Id.* at 8 (emphasis supplied).) California seizes on Section 201(b)(1)'s grant of state jurisdiction "over facilities used in local distribution" and attempts to read this language as an excepted "subset" to the otherwise plenary grant of jurisdiction to FERC over the transmission of electric energy in interstate commerce. Contrary to California, the statute creates no excepted "subset."

California confuses jurisdiction over local distribution with jurisdiction over transmission. It is a basic tenet of statutory construction that where different words are used they are intended to mean different things. Here, different subjects are at issue, jurisdiction over "local distribution" as opposed to jurisdiction over "transmission."[58] FERC recognizes the

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[58] Although subject to case-by-case review under FERC's "seven factor" test, Order 888, 61 Fed. Reg. at 21,625, Enron App. D at 307a-310a, the distinction between transmission and local distribution facilities is generally recognized. In its August 19, 1999 initial appellate brief below (at 3), New York observed that "[t]he key distinction between transmission facilities and local distribution facilities is that local distribution facilities normally provide one-way power to serve end-users. ... [P]ower does not flow from a local distribution system to other such

states' jurisdiction to regulate local distribution. Order 888, 61 Fed. Reg. at 21,619, Enron App. D at 281a. Underscoring the legislative awareness of the distinction between "transmission" and "local distribution," Section 201(b)(1) provides the states an express reservation of jurisdiction over transmission, where used "*only for* the transmission of electric energy in *intrastate commerce*" (emphasis supplied). The parallel distinction between this limited grant of state jurisdiction and the federal grant of jurisdiction over "the transmission of electric energy in interstate commerce" is marked, compelling, and logical. Congress provided a plenary grant of jurisdiction to FERC to regulate transmission in the federal domain of interstate commerce. FERC has grown into this transmission jurisdiction with the expanding interconnection of the grid, and changes in both the industry and the way electricity is bought and sold.

California, like New York, must read language into the statute that does not exist. The "ordinar[y]" practice is to "resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29. The FPA does not say that FERC has only "some" jurisdiction over the transmission of electricity in interstate commerce or in any way suggest that FERC's transmission jurisdiction is limited by the states' jurisdiction over local distribution facilities. In an attempt to surmount this daunting hurdle, California contends that the phrase "local distribution" is essentially a term of art that includes retail transmission. (*See, e.g.*, CA Br. at 10-11.) California grounds its misinterpretation of the statute upon a misreading of *CL&P*, the principal authority on which it seeks to rely. The issue in *CL&P* was whether CL&P was a FERC-jurisdictional "public utility."[59] What

systems. A transmission system usually ends at a substation where transformers reduce power voltages to lower levels for local distribution." *See also CL&P*, 324 U.S. at 534.

[59] The Court explained that "such regulation depend[ed] on whether [CL&P possessed] facilities ... under the jurisdiction of the Commission." *CL&P*, 324 U.S. at 528. The Court remanded to FERC

was not before the Court, and what *CL&P* did not address, was a contention that Connecticut would have had jurisdiction over all transmission supporting CL&P's retail sales if CL&P had local distribution facilities that were involved in the delivery of electricity transmitted in interstate commerce. California cites no apposite authority for this proposition, and to the best of TAPS' knowledge there is none.

Indeed, in addressing the Natural Gas Act ("NGA"), a statute to be construed *in pari materia* with the Federal Power Act,[60] this Court has held to the contrary. In *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the Court addressed FERC's jurisdiction over gas transportation under Section 1(b) of the NGA,[61] the counterpart grant of jurisdictional authority to Section 201(b) of the FPA. The Court held that "though the Act's application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." *LP&L*, 406 U.S. at 636 (citation omitted). Regardless of New York and California's different paths of analysis (*viz.*, under the

the determination whether the facilities identified as the basis for exerting jurisdiction were instead local distribution facilities such that FERC would not have jurisdiction over CL&P as a "public utility." *Id.* at 532-33. The *CL&P* Court explained that "once a company is properly found to be a 'public utility' under the Act the fact that a local commission may also have regulatory power does not preclude exercise of the Commission's functions." *Id.* at 533. The Court distinguished, but apparently understood to be good law on this point, *In the Matter of Hartford Elec. Light Co.*, 2 F.P.C. 502 (1941), *aff'd sub nom. Hartford Elec. Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942). The Second Circuit noted that "[Section] 201(b), disjunctively, confers jurisdiction over interstate transmission or interstate wholesale sales," and that to find otherwise could create a regulatory gap "in flat contradiction of the legislative purpose." 131 F.2d at 965.

[60] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

[61] 15 U.S.C. § 717(b).

reservation of Section 201(a) or the local distribution language of Section 201(b)), *LP&L* is a clear and direct rejection of the States' fundamental premise that FERC's jurisdiction over interstate transmission is limited to transmission associated with wholesale sales.[62]

D. The Language of Section 206(d) Does Not Support the States' Position

New York seeks to rely upon FPA Section 206(d),[63] (formerly Section 206(b)) as a demonstration that Congress intended to limit the Commission's role with regard to the transmission component of retail sales to merely providing information at the request of a state. (*See* NY Br. at 12; NY Respondent Br. at 17.) California (CA Br. at 17) casts Section 206(d) as "limited assisting authority," enabling FERC to provide states with the cost of out-of-state facilities used to provide in-state retail service. To the contrary, Section 206(d) further undermines the argument that Congress intended to preserve the states' jurisdiction over all aspects of retail service.

The States' reading of Section 206(d) fails to recognize the authority it expressly provides the Commission "on its own motion" to "determine" transmission cost even where it has

[62] Contrary to California (CA Br. at 24) and New York (NY Respondent Br. at 15), the Hinshaw Amendment to the NGA (codified at 15 U.S.C. § 717(c)) neither supports the States' reading of the FPA nor serves to distinguish *LP&L*. The Hinshaw Amendment, to which there is no parallel provision under the FPA, was "intended to exempt ... persons from FERC regulation only for the purposes of their involvement in intrastate gas transport, not for the purposes of their involvement in interstate ... regulated activities." *Public Utilities Comm'n of California v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998). *LP&L* rests upon this Court's determination that the Commission, and not the states, regulates interstate transport regardless of whether the associated sale is at wholesale or retail. Further, the fact that there is no equivalent in the FPA to the Hinshaw Amendment makes the States' argument suspect at best.

[63] 16 U.S.C. § 824e(d).

no authority to set the rate for the ultimate sale.[64] The Commission is not limited to taking action under Section 206(d) only on the request of a state. The Commission's action under Section 206(d) also is not restricted to mere provision of assistance or information, as highlighted by the use of the term "determine," the same term used in Section 206(a).[65] Nor is FERC's Section 206(d) authority confined to out-of-state facilities, as California suggests.

Thus, Section 206(d) affords FERC the ability to "determine" the transmission component of even bundled sales rates set by the states. *Cf. Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). It cannot support an argument that where a state elects to let the competitive interstate market discipline the generation component of retail electricity prices, and to break out the interstate transmission that retail customers must use to gain direct access to that market, FERC is without authority to regulate the rates, terms, and conditions of that transmission under Sections 205(d) or 206(a).

[64] Section 206(d) provides (emphasis supplied):

> The Commission *upon its own motion*, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may *investigate and determine* the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

[65] Section 206(a) provides that "[w]henever the Commission ... shall find that any rate, charges or classification ... for any transmission or sale subject to the jurisdiction of the Commission, ... is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall *determine* the just and reasonable rate, charge, classification ... to be thereafter observed and in force and shall fix the same by order." 16 U.S.C. § 824e(a) (emphasis supplied).

E. Sections 211 and 212 Do Not Support The States' Position

FPA Sections 211 and 212, as amended by EPAct, further demonstrate the breadth of the grant of jurisdiction to FERC over interstate transmission under Section 201(b)(1). Section 211 grants FERC certain wheeling authority where Section 212 conditions are met. Section 212(a) expressly provides that that wheeling authority is limited to ordering "wholesale transmission service."[66] Congress would have had no need to differentiate in Section 212 between "wholesale" and "retail" transmission if FERC's regulatory authority over "the transmission of electric energy in interstate commerce" was already limited to the provision of only wholesale transmission service, *i.e.*, what New York describes as transmission associated with wholesale transactions. Nothing in Sections 211 or 212 limits FERC's authority under Sections 205 and 206 to regulate unbundled transmission provided voluntarily for retail customers or pursuant to a state retail access program. Section 212(e) is a savings provision, which states that "[e]xcept as provided in section 210, 211, 214, or [212], such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."[67]

To like effect, Section 212(h)'s prohibition against FERC's ordering retail wheeling would be wholly nugatory if FERC did not otherwise have authority under Section 201(b)(1) over interstate transmission associated with retail transactions. Section 212(h) provides that "[n]o order issued under this Act shall ... require the transmission of electric energy ... directly to an ultimate customer."[68] By restricting FERC's authority to order retail wheeling, Section 212(h) merely maintains a state's authority to determine how to regulate the retail sale; FERC cannot require a state to permit

[66] 16 U.S.C. § 824k(a).
[67] 16 U.S.C. § 824k(e).
[68] 16 U.S.C. § 824k(h).

unregulated suppliers to sell power directly to retail consumers, in competition with and through the transmission system of the franchised vertically integrated monopolist. But nothing in Section 212(h) detracts from FERC's authority to regulate the rates, terms, and conditions of the interstate transmission service that a state authorizes retail customers to use to deal directly with competitive generation suppliers.

II. FERC CORRECTLY FOUND THAT ALL TRANSMISSION ON THE INTERCONNECTED GRID IS IN INTERSTATE COMMERCE

Based upon its institutional expertise, and grounded in the precedent of this Court, FERC properly determined that all transmission of electric energy on the interconnected grid is transmission in interstate commerce. Addressing specifically the Commission's jurisdiction over the rates, terms, and conditions of unbundled retail transmission in interstate commerce, FERC held that "[b]ecause of the highly integrated nature of the electric system, this results in most transmission of electric energy being 'in interstate commerce.'" Order 888, 61 Fed. Reg. at 21,725, Enron App. D at 336a. FERC made clear that intrastate transmission occurred only on those electric systems that FERC determined to be not "interconnected" with the interstate grid, *i.e.*, Alaska, Hawaii and those portions of Texas that are linked to the rest of the grid only through direct current ties. *Id.*, 61 Fed. Reg. at 21,625 n.541, Enron App. D at 305a n.541.

New York disputes FERC's factual determination. To prevail, New York must show that there exist discrete transmissions of electricity from within state generators to within state loads. New York claims that "*most* energy passes from power plants to the retail customers who are first in line on transmission lines with suitable capacity" (NY Br. at 45 n.28 (emphasis supplied).) But even New York's assertion necessarily implies that at least *some* energy is always being

supplied to loads from remote, including out-of-state, generators.

More fundamentally, New York's attack on FERC's expert determination conflicts with findings of this Court and numerous lower courts recognizing the scientific and engineering fact that modern interconnected electric systems operate as an integrated network, instantaneously linking multiple generating resources to multiple consuming loads, such that all loads draw from a pool of common and commingled electrons.[69] For example, in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), this Court recognized that as a matter of engineering New Hampshire could not stop the physical flow of electricity in or out of the state without "sever[ing] ... connections with the [New England] Power Pool." *Id.* at 336. "So long as the electricity produced at New England Power's hydroelectric plants continues to flow through the Pool's regional transmission network, it will be impossible to contain that electricity within the State of New Hampshire in any physical sense." *Id.* Similarly, in *Arkansas Power & Light Co. v. FPC*, 368 F.2d 376 (8th Cir. 1966), the court affirmed FERC's determination that "generation from each source in the system contributes directly or indirectly, and to an ever varying extent, to the energy present in all parts of the system which are not isolated from out-of-state energy sources." *Id.* at 382 (citation omitted).

FERC and the court of appeals below properly relied upon *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 461 (1972) as support for the determination that the interconnection of modern electric systems results in a "coming[ling]" of electrons in a common "reservoir." The scope of this holding was not lost on Justice Douglas writing

[69] *See also Public Serv. Co of Colorado*, 62 F.E.R.C. ¶ 61,013, at 61,061 (1993) (high voltage transmission facilities are integrated into a "cohesive network moving energy in bulk," which "operates as a single piece of equipment").

in dissent *id.* at 471, *viz.*, that FERC had plenary jurisdiction over the transmission of "every privately owned interconnected [utility] in the United States."[70] *FPL* rejects New York's contention that it is scientifically possible to exactingly trace the flow of electrons from a specific generator to a specific load on a highly integrated multi-state grid. "Logic would seem to dictate that where the utility ... has continuous access to an integrated pool of interstate energy, the tracing of out-of-state energy is indeed difficult, burdensome, and perhaps impossible." *Id.* at 468 n.18 (quoting *Arkansas Power*, 368 F.2d at 382).

New York's attempt to distinguish *FPL* as an accounting case (NY Br. at 42-44) is rebutted by *FPL* itself. In affirming FERC's determination that FPL was a public utility subject to Part II regulation, this Court upheld the Commission's order below that FPL "must comply with all ... requirements of the Commission's Regulations under [the FPA]." *Florida Power & Light Co.*, 37 F.P.C. 544, 546 (1967), *aff'd*, 404 U.S. 453.

New York's depiction of intrastate transmission on the eastern and western grids is a fantasy that defies scientific truth and common experience. Perhaps nothing brings home the interconnected and integrated nature of the grid more dramatically than system failures. As explained in the Commission's Report to the President concerning the 1965 Northeast blackout, the "Northeast power failure began at approximately 5:16 p.m. on November 9, 1965, and by 5:30 p.m. most of the northeastern United States ... was in darkness.... The failure encompassed 80,000 square miles ... and directly affected an estimated 30 million people in the

[70] It is immaterial whether *FPL* rested on "one or more electrons" being in interstate commerce. (NY Br. at 42 n.25.) Justice Douglas's criticism of *de minimis* power flows is plainly a relic of the past. Since *FPL* was decided, Florida Power & Light has directly integrated its operations with utility operations in Georgia by means of 500 kv transmission facilities. *Florida Power & Light Co.*, 27 F.E.R.C. ¶ 61,333, at 61,641 (1984).

United States and Canada."[71] As utility systems became electrically isolated in response to the power surge they were left with insufficient resources to serve load, leading to blackout.

> The second stage [of the blackout] marked the attempted survival of the electric utilities in eastern New York and New England which had been separated from the rest of the interconnected systems of the United States. Isolated from other systems, these "islands" ... generally were left with insufficient generation to meet their loads. Power generation in virtually all of this area ... ceased within a matter of three to twelve minutes.

Report at 7-8. The western grid has also suffered catastrophic blackouts. In August 1996 a transmission failure caused by sagging transmission lines in Oregon resulted in a power outage that cut electricity to more than four million people in nine Western states.[72]

Given the interconnected and highly integrated nature of the electric grid, New York's notion that loads connected to the integrated high voltage grid are served separately from within-state generation is simply false. It rings particularly hollow in the context of the unbundled transmission service required to support retail customer access to competitive interstate generation markets.

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[71] Federal Power Commission, Vol. 1 – Report of the Commission, Prevention of Power Failures at 7 (July 1967).

[72] "Officials said the weakened grid knocked out the four main power highways that send electricity to the other states, causing a virtual domino effect." CNN, *Sagging power lines, hot weather blamed for blackouts*, CNN Interactive, Aug. 11, 1996, *at* http://www.cnn.com/US/9608/11/power.outage.

III. ONLY FERC IS COMPETENT TO REGULATE INTERSTATE TRANSMISSION

To the extent there is any ambiguity concerning FERC's FPA authority to regulate unbundled transmission to retail customers, the matter must be resolved in FERC's favor. FERC is competent to regulate unbundled retail transmission as a matter of interstate commerce; the states are not.

> [W]hen a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. ... [W]here congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs.

LP&L, 406 U.S. at 631 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961)).

New York and California assert that the states can regulate unbundled "retail transmission" that is in interstate commerce. Remarkably, neither addresses where the scope of this purported jurisdiction ends. New York states (NY Br. at 6 n.2) that what it means by "retail transmission" is defined in the Glossary of Terms contained in New York App. Q. Appendix Q defines "retail transmission service" to encompass all "[t]ransmission provided to a retail customer." (NY App. Q-3.) Where a state unbundles transmission and allows retail customers access to competitive electricity markets, this definition could encompass transmission service by numerous utilities, stretching across several states. California defines "retail transmission" to mean "the utility's use of its own transmission and other facilities to deliver electric power to the retail customer at the place of end use." (CA Br. at 6 n.4.) This definition is problematic in

several respects. The unbundled transmission service necessary to support a competitive retail sale may require the use of multiple utilities' transmission facilities. In addition, the transmission facilities of a particular utility may extend over multiple states.

Even cursory analysis makes clear that the states are not able to regulate interstate transmission associated with an unbundled retail sale. For example, no state could regulate the transmission service required for the direct sale from a generator in Oregon to an end use customer in California. California has no power to regulate that portion of the transmission arrangement that moves over transmission facilities in Oregon, and Oregon is equally powerless to regulate the California leg of the transmission.

> [A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

Healy v. The Beer Institute, 491 U.S. 324, 336-37 (1989).

Unlike the states, FERC *can* regulate the multi-state transmission service necessary for suppliers and retail customers to avail themselves of competitive generation markets. FERC correctly determined that a uniform tariff was necessary to ensure competitive markets and avoid balkanization. FERC's *pro forma* tariff is the bridge that transcends the unworkable gaps in state regulation of unbundled retail transmission. Under Section 1.11 of the *pro forma* tariff, "any retail customer taking unbundled Transmission Service pursuant to a state retail access program" is an "Eligible Customer" entitled to open access transmission service. Order 888, 61 Fed. Reg. at 21,708.

Thus, under the tariff, a customer in state A, which has authorized retail customers to directly access competitive generation markets, can obtain the transmission service necessary to reach any willing supplier in state B (or C, or D), and the entire transmission arrangement is governed by the FERC *pro forma* tariff regardless of state boundaries. States that have implemented retail competition should welcome the necessary ingredients of FERC regulation and the *pro forma* tariff so that their residents can access competitive interstate markets and out-of-state resources.

State regulation of the interstate transmission necessary to provide retail customers access to competitive interstate markets is inherently unworkable. Through the *pro forma* tariff, FERC has provided a uniform transactional and operational schema to address, *inter alia*, matters of transmission (including interface) capacity, scheduling, reservation, priority rights, available types of service, curtailment, and pricing. Permitting a state to regulate transmission for its retail customers differently from FERC's regulation of transmission for wholesale customers and out-of-state retail customers[73] creates conflicts that will paralyze the grid and cripple the interstate electricity markets on which retail access programs necessarily rely. The inevitable result would be conflicting claims over rights to use what is necessarily a single integrated transmission system, with *no* regulatory body in a position to resolve those claims.

FERC's *pro forma* tariff provides a "first-come first-served" system for reservation of long term "firm" (non-interruptible) transmission capacity.[74] If states had authority

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[73] Under New York's definition of "retail transmission," this retail transmission apparently would be regulated by other states (and not FERC), but regulation of retail transmission by a multiplicity of individual states only aggravates the problem of conflicting regulation.

[74] *See* Order 888, Tariff § 13.2, 61 Fed. Reg. at 21,711, which establishes the first-in-time reservation priority for "point-to-point" service (where a customer reserves a specified amount of transmission from designated

to set the rates, terms, and conditions of unbundled transmission service for retail customers, each state could establish a different rule for reserving use of the same transmission interstate facilities that are governed by FERC's tariff. The inevitable result would be impairment of competitive interstate markets, and degradation of reliability.

For example, state A could establish a rule that its retail customers are entitled to have their transmission requests satisfied first, with previously submitted transmission requests of wholesale customers and retail customers from neighboring states accorded only leftover capacity. Assume an interface between a utility in state A and a utility in state B can safely accommodate 100 MW of transfers from state B into state A, and that unbundled retail customers from state C (that were importing power from state B through state A) and wholesale customers already had reserved 60 MW of that import capacity. If state A's retail customers later seek to reserve another 60 MW under state A's "my retail customers come first" rule, then the interface could not carry all the transactions that are properly confirmed under FERC's reservation regime and state A's rule without threatening reliability or safety. If, to protect the transmission system from an overload, the state A utility followed state A's rule and curtailed the wholesale and state C retail customers, leaving those customers without a source of power, competitive interstate markets would be undermined. In addition, state A's rule would thwart state C's policy decision to rely on direct access by retail customers to competitive interstate markets to ensure just and reasonable

points of receipt (where the energy is deemed to enter the grid) to designated points of delivery (where energy is deemed to leave the grid by contractually being delivered into a neighboring system or distribution facilities)). Section 13.2 accords point-to-point customers equal reservation priority with designations made for "Network Service" (where a customer reserves service by designating "Network Resources" to serve its designated "Network Load"), as well as "Native Load Customers" (which include bundled retail and wholesale load).

retail electricity prices. Imposition of retaliatory preference rules by state C would not be hard to imagine.[75]

In its Brief as Respondents (NY Respondent Br. at 18), New York unwittingly concedes that individual state regimes for reserving transmission service will not work. New York argues against the potential for discrimination against wholesale users by relying on Order 888's limits on the ability of vertically integrated utilities to reserve capacity for bundled retail load growth. Yet, by asserting the authority to regulate the rates, terms and conditions (without apparent exception) of unbundled retail transmission service, New York claims the rights to impose a reservation regime different than FERC's regime (and different than other states), inviting discrimination and jurisdictional conflicts over use rights.

Similarly, if the States are correct, they could establish a curtailment priority for unbundled retail transmission service that conflicts with the *pro rata* curtailment priority established by FERC's open access tariff. California (CA Br. at 29-30) recognizes the "common[]" state practice, "when transmission is short," of "requir[ing] electric utilities to protect first the retail customers to whom public utility obligations are owed" and argues against FERC authority over unbundled retail transmission because it would enable FERC to "implement its different policy for retail customers directly." California thus highlights the potential, if the States' position is adopted, for each state to discriminate in favor of its own retail customers, while subordinating the rights of wholesale and out-of-state retail users. Such parochialism will defeat retail access programs in

[75] State imposition of a queuing mechanism for interruptible retail transmission service that differs from the mechanism applicable under Section 14.2 of the *pro forma* tariff (which provides for ranking based on duration and pricing), Order 888, 61 Fed. Reg. at 21,712, also could cause havoc.

neighboring states, and undermine the competitive electricity markets Congress has sought to promote.

As California correctly concedes (CA Br. at 8 n.5), electricity is instantaneously generated, transmitted, and consumed. To access competitive markets, all users must rely on the same integrated transmission grid. Perhaps no other industry stands more in need of a single set of interstate rules, and a single traffic cop, to ensure the coordinated, non-discriminatory, and efficient use of the transmission required to support competitive electricity markets. For example, it would be inconceivable for Virginia to establish a rule that during rush hours, out-of-state vehicles on Interstate 95 must pull over to the shoulder so Virginia vehicles may pass. *Cf. Buck v. Kuykendall*, 267 U.S. 307 (1925).[76] But that is precisely what the "commonly" applied state curtailment practice touted by California (CA Br. at 29-30) would invite with regard to interstate transmission highways.

State regulation of interstate transmission creates an impermissible risk of unlawful protectionism. Each state "would be obliged to regulate in the State, not the national interest." *LP&L*, 406 U.S. at 633. The inevitable conflict of high cost and low cost states "will create contradictory regulations that cannot possibly be equitably resolved by the courts." *Id.* at 634. Cries for state protectionism have already been sounded in California.[77] By regulating transmission for

[76] *Buck* struck down an Oregon law prohibiting interstate carriers from using certain highway routes. The law impermissibly regulated "the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner." *Buck*, 267 U.S. at 315-16.

[77] A.B. 6 § 3, 2001 Leg., 1st Ex. Sess. (Cal. 2001) (enacted), amends Section 377 of the California Public Utilities Code to provide that the California Public Utilities "commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers." This would appear to ban the export of power. In his State of the State address Governor Davis is reported as stating that "there's no point in building more plants in our state if the electricity will flow out of our state." Governor Gray Davis, State of the State Address (Jan. 8, 2001), *text available at* http://www.governor.ca.gov/state/govsite/gov_homepage.jsp.

unbundled retail customers, any state could effectively shut down the import and export of electricity for competitive sales at wholesale and retail, as well as "through traffic." But no such protectionist authority over competitive interstate markets was reserved to the states under the FPA. The states cannot "restrict the flow of privately owned and produced electricity in interstate commerce, in a manner inconsistent with the Commerce Clause." *New England*, 455 U.S. at 344.[78] The importance of the Commerce Clause, U.S. Const. art. I, § 8 cl. 3, has been manifest in matters like this since *Gibbons v. Ogden*, 22 U.S. 1 (1824).

FERC's purpose in regulating unbundled transmission for retail customers was to avoid balkanizing the interstate transmission of energy. Order 888, 61 Fed. Reg. at 21,627, Enron App. D at 315a. FERC recognized that in doing so it was addressing newly competitive markets. Order 888-A, 62 Fed. Reg. at 12,369, Enron App. E at 476a-477a. California's response is a *non sequitur*. California asserts that the states "are free under the Federal Power Act to maintain ... 'balkanization' and 'discrimination' in the retail power market, *by retaining the traditional system of monopoly utility service* and regulation for retail power." (CA Br. at 20 (emphasis supplied).) Even if California's characterization of FERC's jurisdiction over the transmission component of

[78] New York is wrong to argue that because Congress in 1935 did not foresee retail competition and unbundled retail transmission, it must be presumed that regulation over this interstate transmission was left to the states. (NY Br. at 30.) Matters reserved to the states under the FPA are subject to the restrictions of the Commerce Clause. *New England*, 455 U.S. at 343. Because state regulation of such interstate transmission would run afoul of the Commerce Clause, it is instead presumed that the federal authority granted under FPA Section 201(b) governs. *LP&L*, 406 U.S. at 631.

bundled retail sales were accepted,[79] it cannot justify extending that ability to discriminate to states that have abandoned "the traditional system of monopoly utility service" in favor of retail competition and unbundled transmission service. A state cannot provide its retail customers direct access to competitive interstate markets and then "discriminate[] against interstate commerce ... [in] favor [of] in-state economic interests over out-of-state interests." *Healy*, 491 U.S. at 337 n.14 (quoting *Brown-Foreman Distillers Corp. v. New York*, 476 U.S. 573, 579 (1986)).

IV. FERC'S ASSERTION OF JURISDICTION DID NOT INVADE EXCLUSIVE STATE DOMAIN

A. FERC Has Regulated Unbundled Retail Transmission For Decades

California contends that the states have historically regulated "100% of retail transmission." (CA Br. at 2.) To like effect, New York claims that for 80 years the states have regulated "all aspects of retail deliveries," including retail transmission. (NY Br. at 16.) This is not correct. For decades, FERC has regulated unbundled transmission service to retail customers under FERC-jurisdictional tariffs. Reported cases describing such service are relatively small in number, because prior to the recent introduction of retail competition and due to state franchise restrictions, there were few instances where FERC-jurisdictional public utilities provided unbundled transmission service for end use customers. Nevertheless, prior to Order 888, FERC regulated such transmission in circumstances involving: (1) state retail choice programs; (2) governmental power authorities authorized to provide service to certain end use customers (notwithstanding state territorial laws); and (3) agreements where utility A obtains transmission service over utility B's

[79] The scope of FERC's jurisdiction over the transmission use for bundled retail sales is at issue in No. 00-809.

transmission system to reach utility A's remote retail customers.

FERC regulated unbundled retail transmission service in both New York and California long before Order 888. Beginning in 1975, and pursuant to FERC Rate Schedule No. 95, the Niagara Mohawk Power Corporation ("NIMO") provided transmission service to the New York Power Authority ("NYPA")[80] to serve "six ... industrial customers in Niagara Mohawk's service territory." *Power Auth. of New York v. Niagara Mohawk Power Corp.*, 79 F.E.R.C. ¶ 61,159, at 61,744 (1997). NYPA obtained the right to serve these industrials "pursuant to a 1968 state retail access program authorized by ... New York Public Authorities Law (PAL) sections 1001 and 1005." *Id.* As further shown by its filing at FERC to increase transmission rates, NIMO conceded and FERC accepted the Commission's jurisdiction over NIMO's unbundled transmission service for NYPA's retail customers. *Niagara Mohawk Power Corp.*, 34 F.E.R.C. ¶ 61,028 (1986).

Similarly, in 1981, the Commission found that it (and not New York) had jurisdiction over Consolidated Edison's provision of unbundled transmission service to NYPA's end use customer, the Port Authority of the State of New York. *Consolidated Edison Co. of New York, Inc.*, 15 F.E.R.C. ¶ 61,173, at 61,405 (1981).[81]

Another example of FERC's exercise of jurisdiction over transmission service for retail customers in New York prior

[80] NYPA is also referred to as the Power Authority of the State of New York.

[81] FERC accepted the parties' agreement to permit the New York Public Service Commission to act as initial "arbiter" of the transmission rates. *Consolidated Edison*, 15 F.E.R.C. at 61,405. FERC did so as a matter of administrative convenience expressly subject to FERC's own independent analysis of the rates and FERC's determination that the rates were not unduly discriminatory within the meaning of the FPA. *Id.* at 61,405-06.

to Order 888 is FERC Rate Schedule 165, a transmission service agreement between New York State Electric and Gas Company and NIMO.[82] NYSEG provided firm transmission service to NIMO to permit NIMO's generation and resources to serve NIMO's "remote [retail] loads" which were connected to NYSEG's transmission system. *Niagara Mohawk Power Corp.*, 82 F.E.R.C. ¶ 63,018, at 65,136 (1998) (initial decision), *aff'd in relevant part*, 92 F.E.R.C. ¶ 61,168 (2000).

FERC also regulated unbundled retail transmission in California pre-Order 888. In *Pacific Gas & Elec. Co.*, 56 F.E.R.C. ¶ 61,322 (1991), FERC rejected PG&E's attempt to terminate transmission service for the Western Area Power Administration ("WAPA") that enabled the federal power marketing agency to serve its end use customer, the Lawrence Livermore National Laboratory. FERC explicitly rejected PG&E's claim that the service provided was pursuant to "PG&E's standby retail power tariff." *Id.* at 62,289. FERC found that "[t]ransmission service provided by PG&E to WAPA and its customers under the contract must be provided at the [FERC] filed rate which is applied to energy flows to Livermore over PG&E's lines." *Id.* at 62,291 (footnote omitted). Pursuant to a 1967 agreement (Contract 2948A), PG&E transmits WAPA's generated and purchased power to serve "direct loads," including a number of end use irrigators. *Pacific Gas & Elec. Co.*, 20 F.E.R.C. ¶ 61,190, at 61,366, *order on reh'g and clarification*, 21 F.E.R.C. ¶ 61,115 (1982).[83]

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[82] The Commission accepted NIMO FERC Rate Schedule 165 in 1990 (permitting it to become effective as of 1987). *Niagara Mohawk Power Corp.*, 51 F.E.R.C. ¶ 61,273, at 61,861 (1990).

[83] *See also Pacific Gas & Elec. Co.*, 50 F.E.R.C. ¶ 61,383, at 62,173 (1990) (discussing PG&E transmission service under Contract 2948A to transport "electricity required to operate [the water storage district's] pumps," *i.e.*, end use customer).

FERC's exercise of jurisdiction over unbundled retail transmission service is not new. What is new is the amount of such service with the introduction of retail choice, and the implications of federal or state jurisdiction over the suddenly expanded use of this interstate transmission service.

B. FERC Cannot Be Faulted For Responding Promptly To The New Market Development of Retail Electric Competition

Order 888 was pro-active in asserting jurisdiction over transmission for unbundled retail customers. When Order 888 issued in April 1996, retail competition (and attendant transmission unbundling) was largely a matter of discussion, and some limited pilot programs. California, the first state to do so, embarked upon retail restructuring and electric competition, on September 23, 1996.[84] FERC understood that it was being pro-active in responding to new market developments likely to arise as a result of increasing competitive market pressures. FERC cogently explained that it was not "taking away" anything from the states and that "[r]ather than claiming 'new' jurisdiction; the Commission is applying the same statutory framework to a business environment in which, as discussed below, retail sales and transmission service are provided in separate transactions." Order 888-A, 62 Fed. Reg. at 12,369, Enron App. E at 476a-477a. FERC found:

> [I]n today's markets, and increasingly in the future as more states adopt retail wheeling programs, retail transactions are being broken into products that are being sold separately: transmission and generation. Moreover, these products are being sold increasingly by two or more different entities. For example, a transaction may involve transmission service from one or more transmission providers who

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[84] A.B. 1890, 1996 Leg., Reg. Sess. (Cal. 1996) (enacted).

> move power from a distant generation supplier, over the interstate transmission grid, to an end user. Because these types of products and transactions were not prevalent in the past ... the Commission cannot be viewed as "disturbing" the jurisdiction of state regulators ....

Id.

Rather than leaving a jurisdictional void, FERC created the regulatory structure over unbundled retail transmission that has permitted retail choice to go forward. Stimulated by EPAct's intent to promote competitive electricity markets, FERC only "began to address the problem of the disparity in transmission service that utilities provided to third parties in comparison to their own uses of the transmission system" in "the Spring of 1994." Order 888, 61 Fed. Reg. at 21,547, Enron App. D at 159a. Having turned its attention to the problem of discrimination in interstate transmission service supporting competitive electricity markets, FERC swiftly moved to a scheme of uniform open access transmission service. It would have been patently incongruous with the FPA's broad grant of authority over interstate transmission and its directive to remedy undue discrimination for FERC to have declined jurisdiction over the unbundled transmission service used by retail customers to access the competitive interstate market, and instead permitted the balkanization that California openly champions, and New York, by its position, encourages.[85]

[85] New York is correct that industry developments subsequent to the enactment of the statute cannot change the FPA's grant of jurisdiction to FERC (NY Br. at 15), but this does not support New York's position. *Colton*, 376 U.S. at 207 n.1, shows that even where the states have erroneously regulated in a given area for decades, this conduct cannot serve to oust the Commission from exercising its FPA jurisdiction. The FPA grants FERC, and not the states, jurisdiction over public utilities' transmission of electric energy in interstate commerce.

C. The States' Policy Arguments Cannot Eliminate the Need for Federal Regulation of the Interstate Transmission Required for Retail Choice Programs

New York decries Order 888 as unduly disruptive of state retail rate regulation. (NY Br. at 46-48.) California contends that Order 888 "constrain[s]" its efforts to remedy "the electric utility disaster caused by retail restructuring." (CA Br. at 1.) But it was, and is, a state's decision whether to adopt retail competition and implement unbundling. A state that moves to retail competition is substituting market forces for traditional rate regulation of generation costs. The California "disaster" is not caused by FERC's regulation of transmission service; rather, the causes of high market prices include a serious shortage of new generating capacity, a matter which has thus far been left exclusively to the states. Restricting access to generation markets by means of state regulation of interstate transmission is not a formula for lowering energy prices. To the contrary, it is a prescription for capital flight and market avoidance. The States fail to and cannot explain how state control over interstate transmission service is "sound energy policy." (NY Br. at 46.)

Order 888 does what states cannot do on their own. It facilitates retail customer access to interstate electric markets. Unbundled transmission service is provided under the *pro forma* tariff, allowing retail customers to deal with competitive generation suppliers beyond the boundaries of their former supplier and state.

The gap between what states cannot do on their own and what FERC can do and is doing to provide the non-discriminatory open access transmission necessary for competitive generation markets widens into an enormous gulf in the context of independent system operators or regional transmission organizations. This movement toward

regionalization of the transmission grid is required by some state restructuring laws and encouraged by FERC.[86]

Regional transmission organizations take FERC's open access tariffs the next step. They provide retail choice customers, as well as wholesale customers, access to suppliers near and far (even several states removed) under a single regional open access tariff. As recognized by FERC,[87] regional tariffs enhance competition by eliminating the cumulative utility-specific transmission charges otherwise imposed as transactions cross corporate transmission boundaries. Such "pancaked" charges operate as tolls, increasing the cost of energy and constricting the market. Applying a single access charge over a multi-utility region expands competitive power supply options. For example, as a result of an agreement involving two regional organizations, retail choice and wholesale customers in Virginia or Michigan will be able to purchase from generators in Minnesota, Kentucky or Missouri (and most places in between) at a single, "mega-regional" access charge.[88] The scope of the competitive interstate market that retail choice customers can reach through FERC's non-discriminatory open access transmission service continues to grow, further outstripping an individual state's ability to regulate the transmission needed to access that market.

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[86] *See supra*, at 10 & n.32-34. *See also Regional Transmission Organizations*, Order No. 2000, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,089, 65 Fed. Reg. at 810 (Jan. 6, 2000), *order on reh'g*, Order No. 2000-A, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,092, 65 Fed. Reg. at 12,088 (Mar. 8, 2000), *appeal docketed sub nom. Pub. Util. Dist. 1 v. FERC*, No. 00-1174 (D.C. Cir. Apr. 24, 2000). FERC found that regional transmission organizations also facilitate efficient and reliable transmission, and eliminate the incentive and opportunity for discrimination. *Id.*

[87] Order No. 2000, 65 Fed. Reg. at 823-25.

[88] *Illinois Power Co.*, 95 F.E.R.C. ¶ 61,183, 2001 FERC LEXIS 1018 (May 8, 2001).

Thus, what is at stake here is not "proper depreciation charges." (NY Br. at 47.) It is, instead, nothing less than the regulatory underpinnings necessary for viable and competitive interstate generation markets.

CONCLUSION

For the reasons indicated above, New York's challenge to the D.C. Circuit's affirmance of FERC Orders 888 and 888-A should be rejected.

Respectfully submitted,

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